NO. 48907-4-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DENNIS J. W. FISHER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY

The Honorable Brian P. Coughenour, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. ASSIGNMENTS OF ERROR

1. Appellant Dennis Jason Fisher was seized in violation of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution.

2. The pat-down weapons search of Mr. Fisher was in violation of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution.

3. The search following Mr. Fisher's arrest was in violation of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution.

4. Mr. Fisher was denied effective assistance of counsel when his attorney failed to bring a motion to suppress heroin and currency in the amount of $7087.10 that was found during the unlawful search and to seek dismissal of the case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article 1, section 7 of the Washington Constitution permits an officer to conduct a brief frisk, limited to a search for weapons. In the present case the officer lifted Mr. Fisher's shirt in order to see his front jeans pocket while conducting a "pat down" search and then put her fingers into an inner "coin pocket" located within the front pocket of Mr. Fisher's jeans and retrieved a small packet containing a suspected controlled substance. The officer did not feel an object inside the coin pocket, and the officer did not suspect that a "big

bulge" in his right front jeans pocket was a weapon because she did not manipulate the bulge until after his arrest. After lifting his shirt to see the pocket the officer removed a one-inch plastic packet containing a small amount of heroin from Mr. Fisher's inner "coin pocket." The officer arrested Mr. Fisher for possession of drugs and then, while searching him incident to arrest, obtained a large amount of folded currency in the amount of $7078.10 from the right front pocket of Mr. Fisher's jeans. Would the heroin and currency have been excluded from admission if defense counsel had brought a CrR 3.6 motion to suppress the heroin as the result of an illegal search and motion to suppress the currency as fruit of the poisonous tree? Assignments of Error 1 and 2.

2. Where the officer did not have an objectively reasonable belief that Mr. Fisher was armed and presently dangerous, was the weapons search unlawful? Assignments of Error 1, 2 and 3.

3. A "weapons frisk" must be justified at its inception and reasonably related in scope to the initial justification. Even assuming an officer has reasonable grounds to initiate a weapons frisk, once she determines the person is unarmed, she may not prolong the search. Was the search of Mr. Fisher's inner coin pocket unlawful where the officer was no longer feeling for weapons and moved Mr. Fisher's to "see [his] pocket" while failing to manipulate or further feel a "big bulge" she saw in right pants pocket, and instead reached into his coin pocket after moving his shirt and after determining that Mr. Fisher was unarmed? Assignments of Error 1,2, and 3.

4. The search that produced the heroin and currency was unlawful under article 1, section 7 of the Washington constitution, and the resulting arrest and subsequent search resulting in the discovery of folded cash was similarly unlawful. Counsel failed to seek suppression of the unlawfully seized evidence, however, and Mr. Fisher was convicted. Where the State's case rested on the unlawfully seized evidence, did counsel's failure to have the evidence suppressed deny Mr. Fisher effective representation? Assignment of Error 4.

C. STATEMENT OF THE CASE

1. Procedural facts:

Officer Julie Goode of the Forks Police Department was dispatched to investigate a report of a disturbance in progress at a residence in Forks, Clallam County, Washington at approximately 9:00 p.m. on October, 13, 2015. Report of Proceedings[1] (RP) at 121-23. The officer was advised that Dennis Jason Fisher had allegedly kicked in a bedroom door in a house, entered the bedroom and yelled at an occupant of the room and drew his hand back as if he was going to hit the occupant, and then left the scene in a black sports utility vehicle. Clerk's Papers (CP) 97. Shortly after receiving the report, Officer Goode contacted Mr. Fisher driving a black SUV near Forks

[1] The record of proceedings consists of two volumes, which are designated as follows: 1RP–December 17, 2015; February 25, 2016; March 28, 2016; March 29, 2016 (CrR 3.5 suppression hearing, jury trial); 2RP–March 30, 2016 (jury trial); and April 5, 2016 (sentencing).

matching the description given by the reporting party. RP at 90, 122; CP 97. After stopping the vehicle, Officer Goode detained Mr. Fisher, conducted a pat down search, and saw a "big bulge" in his front right jeans pocket. RP at 125. The officer did not manipulate the bulge and instead lifted his shirt with her fingers in an effort to see his pants pocket. RP at 125. After moving his shirt, the officer reached into an inner coin pocket located inside the larger pants pocket and removed a small plastic packet of what she suspected to be heroin. RP at 125. Mr. Fisher was placed under arrest and then searched. RP at 125. The officer found currency in the amount of $7087.10 in Mr. Fisher's right front jeans pocket.[2] RP at 125, 135; CP 97.

The State filed a motion for determination of probable cause based on a sworn narrative prepared by Officer Goode. CP 96, 97. Officer Goode referred to Mr. Fisher in the narrative by his middle name, Jason. The narrative states in part:

> I detained Jason at approximately 2117 hrs and as I patted Jason down for weapons I lifted his shirt to expose his right front pocket. I saw a "dime" bag sticking out of the small inner pocket with a dark colored substance inside.
>
> I immediately seized the bag and based on my training and experience I believed the substance to be heroin due to the black, hard rock like texture. The substance later tested positive for heroin using a NIX

[2]Mr. Fisher testified that the bills were divided into two amounts that were in both his front pockets. RP at 177.

Test A. The heroin weighed 0.5 grams without packaging.

> I advised Jason he was under arrest for possession of a controlled substance and then searched his person incident to arrest. In the same front pocket as the heroin I found $7078.10 in cash, with the bills being in $100 and $50.00 denominations. I read Jason Miranda Warnings from the card I carry.

CP 97.

Mr. Fisher was charged in the Clallam County Superior Court with one count of residential burglary (count 1) and possession of heroin[3] (count 2). CP 93. The information was later amended to dismiss the burglary charge.

The court conducted a CrR 3.5 suppression hearing the morning of trial regarding statements that Mr. Fisher made to Officer Goode at the time of the pat-down search and arrest. RP at 87-116. Defense Counsel did not move to suppress the heroin or currency pursuant to CrR 3.6.

a. <u>CrR 3.5 hearing</u>

At trial Mr. Fisher denied that Officer Goode read his *Miranda*[4] warnings to him at the time of his arrest, denied that he was in possession of heroin, and denied that he made any statement regarding the heroin she said that she found in his coin pocket. RP at 183-85.

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[3]RCW 69.50.4013, RCW 69.50.4013(1).
[4]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At the suppression hearing, Officer Goode stated that she contacted Mr. Fisher and read his *Miranda* warnings to him from a card after finding suspected heroin in his coin pocket. RP at 90. She testified that he was under the influence of drugs or alcohol but that she believed that he understood his constitutional rights as read to him. RP at 93. She said that he agreed to talk with her and when asked about drugs she said were in his pocket, he said that he had "forgotten it" and that he had not used for two days. RP at 94.

Mr. Fisher stated that Officer Goode did not read his *Miranda* warnings to him and denied that he made any statement regarding heroin. RP at 103. He stated that he told Officer Goode that he had money because he was going to make a payment on a cabinet shop that he was buying. RP at 103. After hearing argument, the court found that Officer Goode gave Mr. Fisher oral *Miranda* warnings and that he had the ability to understand, that his statement was freely and voluntarily given, and that the statement was admissible. RP at 111, 112. Findings of fact and conclusions of law were entered April 5, 2016. CP 32.

2. Trial testimony

The matter came on for jury trial on March 29 and 30, 2016, the Honorable Brian Coughenour presiding.

Forks Police Officer Julie Goode detained Mr. Fisher while he was

driving a vehicle at approximately 9:00 p.m. on October 13, 2015. RP at 121, 133. She stated that she knows Mr. Fisher from prior contact that she has had with him, and that she knows him as Jason Fisher. RP at 122. After detaining Mr. Fisher, she conducted a pat down search and acknowledged at trial that she was checking for weapons. RP at 124. She testified while conducting the pat down search, she "went down his waist line in the back and then when I went to move to the front I moved his shirt with my fingers so that I could see the pocket as he had a big bulge in the right pocket of his jeans." RP at 125. It is not clear from her testimony whether she felt the "bulge" during the weapons search or merely saw the bulge in his pants. RP at 125. Officer Goode stated that she moved his shirt up because this was a search "for weapons, I didn't want to poke myself on anything or if maybe there were knives or some unknown weapon didn't want to poke or hurt myself with it[.]" RP at 125. On cross-examination, Officer Goode acknowledged that she did not find any weapons on Mr. Fisher's person as she conducted the pat down search. RP at 133.

Officer Goode stated that after lifting Mr. Fisher's shirt she found a small "coin pocket" inside the main pocket of his jeans and removed a "dime bag" containing a black tar-like substance that she suspected was heroin from the "coin pocket." RP at 125, 133. The substance was subsequently tested and determined to be heroin. RP at 168. Exhibit 2.

Officer Goode testified that she read his *Miranda* warnings and that

when asked about the suspected heroin, he stated that he forgot it was in his pocket and that he had not used in two days. RP at 128.

During trial, the officer did not state that she felt the "dime bag" or that she saw it or any portion of it in the coin pocket. RP at 125. Contrary to her sworn declaration in support of probable cause, she did not allege that she "saw" the bag in his coin pocket. Instead, the record indicates that she reached into the coin pocket after moving his shirt because "he had a big bulge" in the right pocket of his jeans. RP at 125. During direct examination the following exchange took place:

Q: Why would you move his shirt upon feeling a bulge?
A: As this is for weapons, I didn't want to poke myself on anything or if maybe there were knives or some unknown weapon I didn't want to poke or hurt myself with it so---
Q: Okay, continue on. When you lifted up his shirt, did you observe anything?
A: Yes.
Q: What did you observe?
A: On the right hand side of his blue jeans, there's a, what's commonly referred to as like a coin pocket inside the main pocket of the jeans on the right hand side. In that coin pocket there was, it's about his size, it's what commonly known as a dime bag, and it had a black tarry like substance in it.
RP at 125.

During cross examination, the officer stated:

Q: And your testimony is that you found a plastic baggie in that coin pocket of the jeans he was wearing.
A: Yes.
Q: During this pat down?
A: Yes.
Q: Removed it and saw a black substance inside which you believed to

be heroin?

A: Correct.

RP at 133-34.

Officer Goode placed him under arrest and during the search following arrest, she found $7,087.10 in currency in his front jeans pocket.[5] RP at 134. In her sworn probable cause statement, Officer Goode wrote that the money was in "the same front pocket as the heroin." On cross examination, however, the officer stated that the money was not found in the coin pocket. RP at 134-35. On redirect, Officer Goode stated that the smaller coin pocket is inside the pants pocket: "If you look into your jeans, most will have a normal pocket that you can put your hands into and then inside that pocket there's a small pocket that you can usually put change or a key or something into." RP at 141. She stated the money was found in the larger pocket where he would put his hands. RP at 142.

Mr. Fisher testified that the cash seized by Officer Goode was divided into two groups and he put one group of folded bills in his right front pocket and the second folded group of bills into his left front pocket. RP at 177, 181. The total number of folded bills in his pockets was approximately one hundred. RP at 182.

Mr. Fisher stated that he was surprised when informed that he was under arrest for possession of a controlled substance, denied that he had drugs

[5] The money and Mr. Fisher's SUV was seized by the Forks Police Department and was the

in the coin pocket, and denied that any item or object was protruding from the coin pocket in his pants. RP at 178, 179. He demonstrated that the small "dime bag" was an inch and an eighth tall, and that this object would fit completely into the coin pocket. RP at 179.

Mr. Fisher testified that he was carrying the cash because he was going to use the money to pay a dental bill at an appointment he had the next day, and that he was going to use the balance of the cash as a down payment on a building owned by Randy McAvoy. RP at 184. He stated that he carried the large amount of cash on his person because he does not have a checking account because in the past when he had a bank account "it always goes bad" and the bank "always ended up changing me a bunch of fees, and I don't trust banks anymore." RP at 188.

Mr. McAvoy, who was Mr. Fisher's foster parent and has known Mr. Fisher since Mr. Fisher was fourteen, testified that he discussed selling his building to Mr. Fisher on contract three days before his arrest on October 13. RP at 190. He stated that it was not unusual for Mr. Fisher to carry large amounts of cash and that Mr. Fisher did not believe in using banks. RP at 191.

The jury found Mr. Fisher guilty of possession of heroin as charged. RP at 223; CP 33. The court sentenced him within the standard range. 2RP at 236-37; CP 19. An order dismissing the burglary charge was filed March 28, 2016. CP 68. The sentence was stayed during the pendency of appellate

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subject of civil forfeiture litigation. 2RP (4/5/16) at 232.

review. CP 11.

Timely notice of appeal was filed on April 5 and April, 2016. CP 7, 17. This appeal follows.

D. ARGUMENT

1. THE SEARCH OF MR. FISHER THAT PRODUCED THE HEROIN WAS UNLAWFUL UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION, AND TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS EVIDENCE SEIZED DURING THE UNLAWFUL SEARCH CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND DENIED MR. FISHER A FAIR TRIAL.

a. All of the evidence seized from Mr. Fisher must be suppressed because it was obtained as the result of an unconstitutional search and seizure.

Mr. Fisher was searched following a stop for a report of disturbance in progress in which the reporting party stated that Mr. Fisher had kicked in a bedroom door, entered the bedroom, yelled at the reporting party and drew his hand back as if he was going to hit her. CP 97. No report of a weapon was contained in the narrative filed by the Officer Goode in support of probable cause. CP 97. During a subsequent search of the SUV Officer Goode recovered three rounds of 9mm ammunition and 9mm handgun from under the front passenger seat. CP 97. The presence of the handgun, however, was not reported to Officer Goode and not part of the initial report made to law enforcement.

The officer conducted a search for officer safety and found heroin in a

small packet inside the small coin pocket located inside the larger front pocket of Mr. Fisher's jeans, and he was charged with possession of that substance. RP at 124, 125. The initial weapons search was not authorized by either a warrant or the circumstances, however, and it therefore violated Mr. Fisher's constitutional rights. In addition, the search exceeded the permissible scope of a weapons frisk.

Both the state and federal constitutions protect individuals against unreasonable searches and seizures. Const. art. 1 § 7; U. S. Const., amend. 4. A warrantless search is presumed to be unreasonable, and exceptions to the warrant requirement are limited and carefully drawn. *State v. Hendrickson* , 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). The State bears the burden of proving that a warrantless search falls within one of these exceptions. *Hendrickson*, 129 Wn.2d at 71.

The Fourth Amendment guarantees "[the] right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Washington State Constitution goes further and requires actual authority of law before the State may disturb an individual's private affairs. *State v. Day*, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007); Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or

his home invaded, without authority of law").

Warrantless searches and seizures are presumed unreasonable in violation of both the Fourth Amendment and article I, section 7. *Day,* 161 Wn.2d at 893. Courts have reserved a few "jealously and carefully drawn exceptions to the warrant requirement." *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden to show that the particular search or seizure falls within one of these exceptions. *Id*

An exception to the constitutional ban on warrantless searches and seizures is the "*Terry*" investigative stop. *Day*, 161 Wn.2d at 895; *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A *Terry* investigative stop authorizes police officers to detain a person briefly for questioning without grounds for arrest "if they reasonably suspect, based on 'specific, objective facts' that the person detained is engaged in criminal activity or a traffic violation." *Day*, 161 Wn.2d at 896 (citing *State v. Duncan*, 146 Wn.2d 166, 172-74, 43 P.3d 513 (2002); *Terry*, 392 U.S. at 21).

Under *Terry*, a police officer may detain a person on reasonable suspicion that the person may be involved in criminal activity in order to investigate the suspicious behavior. *Terry,* 392 U.S. at 21.; See also *State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986); *State v. White,* 135 Wn.2d 761, 769 n. 8, 958 P.2d 982 (1998) (containing a list of exceptions to the warrant requirement

recognized in Washington). Police must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant intrusion. *Terry,* 392 U.S. at 21; *State v. Mendez*, 137 Wn.2d 208, 223, 958 P.2d 982 (1998).

Terry permits an officer to conduct a limited search for weapons if the officer has reasonable grounds to believe that the armed and presently dangerous. *Terry*, 392 U.S. at 29; *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. Broadnax*, 98 Wn.2d 289, 294, 654 P.2d 96 (1982) (citing *Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968)). The limited purpose of this search is not to discover evidence of a crime, but to allow the officer to pursue his or her investigation without fear. *Adams v. Williams*, 407 U.S. 143, 146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). Because warrantless searches are per se unreasonable, the State bears the burden of establishing that constitutional requirements are met. *State v. Collins*, 121 Wn.2d 168, 172, 847 P.2d 919 (1993).

To justify a *Terry* stop, the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21

b. The search of the inner coin pocket in Mr. Fisher's jeans was unlawful.

Assuming *arguendo* that the initial pat-down search of the pocket was justified on the basis of officer safety, Officer Goode was not permitted to search the pocket further once she determined it did not contain a weapon. Here, the record contains no indication that Officer Goode saw or felt any object in the coin pocket. Instead, she testified that she moved his shirt to see the bulge in his pants, and then—without further explanation–retrieved the baggie from the inner coin pocket. RP at 125. An intrusion into a pocket without a basis to believe that an object is weapon is not warranted by *Terry*. Here, the officer made no assertion that the felt or saw an object in the coin pocket let, let alone believe that the pocket contained a weapon.

In addition, the further search of Mr. Fisher's pants pocket—during which cash was obtained from either one or both front pockets–was unlawful it was performed pursuant to an arrest of Mr. Fisher for the unconstitutionally obtained heroin. Thus, the search of all his pockets was unlawful and the contents of his pockets must be suppressed.

c. The search of the coin pocket exceeded the proper scope of a pat down frisk.

Under both the Fourth Amendment and article I, section 7, when an officer stops a person, he or she may, under certain circumstances, frisk the person as a matter of self-protection. *State v. Kennedy*, 107 Wn.2d 1, 11, 726

P.2d 445 (1986); *Terry*, 392 U.S. at 24. A "frisk" or pat-down search for weapons is "a serious intrusion upon the sanctity of the person" and may not be undertaken lightly. *Terry*, 392 U.S. at 17.

To justify a frisk without probable cause to arrest, the officer must have a reasonable belief, based on objective facts, that the suspect is armed and presently dangerous. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008); *Terry*, 392 U.S. at 21- 24. Under *Terry*, a warrantless search passes constitutional muster only if (1) the initial detention is legitimate; (2) a reasonable safety concern justifies a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purpose. *Duncan*, 146 Wn.2d 172 (citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). See also, *Adams v. Williams*, 407 U.S. at 146.

Here, Officer Goode did not have grounds to conduct a *Terry* frisk. There is no question that Mr. Fisher was seized. Where an officer commands a person to halt or demands information from the person, a seizure occurs." *State v. Cormier*, 100 Wn.App. 457, 460, 997 P.2d 950 (2000), citing *United States v. Mendenhall*, 446 U.S. 344, 554, 100 S.Ct. 1870 (2000). See also *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008). Officer Goode's testimony, assuming it is credible for purposes of this argument, established a basis on which to detain Mr. Fisher. Mr. Fisher was reported to have been

involved in a disturbance and was seen in an SUV matching the description of the vehicle she stopped. No report of weapons was provided to Officer Goode, and the handgun and ammunition recovered from the SUV was not discovered until after the weapons frisk. However, while the traffic stop may have been justified at its inception, Officer Goode did not have a reasonable safety concern to justify the protective frisk for weapons. Moreover, Officer Goode provided no testimony that Mr. Fisher exhibited signs that he presented a danger or threat to the officer. RP at 123. The officer testified that she did not observe anything that seemed unusual about Mr. Fisher's clothing or his appearance. RP at 123. Merely stopping an individual following a report of a door being kicked in is not enough to cause a safety concern that would justify a protective frisk for weapons.

An officer must point to specific and articulable facts which, coupled with rational inferences, create an objectively reasonable belief or well-founded suspicion that the person is a safety risk. *Cormier*, 100 Wn.App. at 461, citing *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868 (1968). The reviewing court will consider the totality of the circumstances surrounding the stop in evaluating the Terry factors. *Cormier*, 100 Wn.App. at 461.

In *Setterstrom*, the Supreme Court addressed the question of what conduct justifies a *Terry* frisk. In *Setterstrom,* police officers were called to the

DSHS office in Tumwater to investigate two subjects because a caller had alleged that one of the subjects was sleeping and one of the subjects (Setterstrom) appeared to be under the influence of something. *Setterstrom*, 163 Wn.2d at 624. The officers arrived and found Setterstrom filling out a benefits application. *Id.* When asked his name by one of the officers, Setterstrom lied and said his name was Victor Garcia. *Id.* One of the officers described Setterstrom as acting nervous and fidgeting, and believed he was under the influence. *Id.* at 624. Based on this, the officer feared danger and patted Setterstrom down for weapons, finding narcotics. *Id.* at 624. The Court reversed Setterstrom's conviction, holding that the officers' observation of nervous and fidgety behavior, coupled with the suspect lying about his name and that fact that he was under the influence, did not justify a reasonable belief that Setterstrom was armed and presently dangerous. *Id.* at 627. Like the officer in *Setterstrom*, Officer Goode did not have a reasonable concern for danger justifying a protective frisk. Here, record shows that the officer thought Mr. Fisher's clothing and appearance appeared to be unremarkable and provides no other indication that Mr. Fisher presented a risk to the officer. RP at 123.

Even if the initial *Terry* stop was justified, the search of Mr. Fisher by Officer Goode was unlawful because it exceeded the permissible scope of a

Terry pat-down search for weapons. Therefore the evidence recovered from Mr. Fisher as a result of the unlawful search and ensuing arrest should have been suppressed.

The scope of a search incident to a *Terry* stop is "constitutionally limited to that 'sufficient to assure the officer's safety.'" *State v. Larson*, 88 Wn. App. 849, 855, 946 P.2d 1212 (1997) (quoting *Kennedy*, 107 Wn.2d at 12); see also *Terry*, 392 U.S. at 20. The officer may conduct only a limited search for weapons in order to protect himself or persons nearby from physical harm. *Terry*, 392 U.S. at 30. As noted above, an officer must be confronted with specific facts and circumstances within the immediate context of the stop that would provoke a reasonable concern that the individual is armed and dangerous. *Terry*, 392 U.S. at 30; *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. Galbert*, 70 Wn. App. 721, 725, 855 P.2d 310 (1993).

A frisk may not be used as a pretext to search for incriminating evidence when the officer has no reasonable grounds to believe the suspect is armed. *Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968).

If the contact that results from a standard pat-down search fails to identify an object as a weapon, further intrusive efforts, such as manipulation or removal of the object, are beyond the scope of a *Terry* search. *Hobart*, 94

Wn.2d at 439-440; *State v. Rodriguez- Torres*, 77 Wn. App. 687, 693, 893 P.2d 650 (1995).

Washington case law provides that seizures improperly exceed the scope of a protective weapons frisk when hard but very small items that could not reasonably be suspected of being weapons were pulled from suspects' pockets. *In State v. Fowler*, 76 Wn. App. 168, 170, 883 P.2d 338 (1994), review denied, 126 Wn.2d 1009 (1995), the officer removed a hard object, measuring two by three inches, along with two soft objects of indeterminate shape. *Fowler,* 76 Wn. App. at 170. The Court held that this removal exceeded the scope of a protective frisk. *Fowler*, 76 Wn. App. at 173.

In *Galbert, supra*, the removal of a "three inch by one inch lump," which turned out to be rock cocaine, was held to exceed the scope of a weapons frisk. *Galbert*, 70 Wn. App. at 726. In *State v. Loewen,* 97 Wn.2d 562, 647 P.2d 489 (1982), the removal of a small plastic container measuring approximately two by one-half inches, which the court characterized as being "about two-thirds the size of an average lipstick container" was held to exceed the reasonable scope of a weapons frisk. *Loewen*, 97 Wn.2d at 567. Therefore, removal of small objects that cannot reasonably be suspected to be weapons unlawfully exceed the scope of a protective frisk for weapons.

The distinctive size, shape and density of weapons that allows for the

permissible scope of a *Terry* pat-down to be established. *Hudson*, at 113; *State v. Broadnax*, 98 Wn.2d 389, 398, 654 P.2d 96 (1982). Only when a pat-down is inconclusive as to whether an object has the size, shape and density of a weapon is an officer entitled to do more than pat-down a suspect's outer clothing. *Broadnax*, 98 Wn.2d at 298. Only if an officer feels something from which its contour or mass makes its identity immediately apparent as contraband does the "plain feel" exception allow for seizure of the item in the context of a *Terry* frisk.

An officer must have probable cause to believe and immediately recognize the object as contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L. Ed. 2d 334, 345-46 (1993); *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994); *State v. Tzinzun-Jimenez*, 72 Wn. App. 852, 854, 866 P.2d 667 (1994). To satisfy the "plain feel" exception, just as with its plain view antecedent, tactile sensing must provide immediate recognition of the object the officer has come in contact with. *Dickerson*, 124 L. Ed. 2d at 346; *Hudson*, 124 Wn.2d at 119-120; *Tzinzun-Jimenez*, 72 Wn. App. at 857. This tactile recognition must result immediately from the initial pat-down contact. If recognition is even briefly delayed, or results only after further manipulation or visual examination of the object, then the scope of the Terry pat-down for weapons is exceeded. *Dickerson*, 124 L. Ed. 2d at 348

In the present case, the officer did not even rise to the level of "plain feel" before she intrusively manipulated Mr. Fisher's shirt. She testified that she "moved his shirt with my fingers so that in could see the pocket as he had a big bulge in the right front pocket of his jeans." RP at 125. She testified that she did not move the shirt in order to search for a weapon, but so make sure that she did not poke or hurt herself. RP at 125. As argued supra, the officer did not say that she saw the object in the coin pocket, but stated, without explanation of how she was a able to see what was inside the small coin pocket, she said "[i]n that coin pocket there was, it's about this size, it's what's commonly known as a dime bag, and it had a black tarry like substance in it." RP at 125. Since it was not voluntarily produced by Mr. Fisher, the remaining implication is that the officer reached into the coin pocket to retrieve the object.

Even assuming *arguendo* that some portion of the baggie was in plain view, it is clear that she did not see the black tar like substance. Moreover, the officer agreed that she removed the plastic baggie from his pocket and then saw the black substance inside. RP at 133-34.

The officer did not articulate why she reached into the coin pocket and did not articulate why she needed to go any further in her search of Mr. Fisher without manipulating, attempting to identify, or even feeling the bulge in his pants pocket.

Under *Dickerson* and its progeny, lifting Mr. Fisher's shirt to either further inspect the bulge and to determine its identity was unlawful. Officer Goode did not have probable cause to believe the bulge she saw was a weapon. Similarly, there is no indication in the record that she touched or manipulated the object in his coin pocket. In order to fall within the "plain feel" exception, Officer Goode's recognition of the object as drugs had to occur immediately upon her initial contact with the object in Mr. Fisher's pocket. *Dickerson*, 124 L. Ed. 2d at 346. An officer must feel an object "whose contour and mass makes its "identity immediately apparent" before the "plain feel" exception applies. *State v. Garvin*, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). Once an officer determines there are no weapons, the permissible scope of the search ends and the officer needs probable cause to search further. *Id.*

The facts of *Garvin* are remarkably similar to the facts in the present case. In *Garvin*, an officer stopped Garvin's car and patted him down for weapons. *Id.* 166 Wn.2d at 245. As he patted Garvin's right front pants pocket, he felt something in the coin pocket that he recognized by feel as the type of plastic baggie used by drug users to package illegal drugs. *Id.* at 245-46. The officer did not feel any weapons or hard objects when he first felt the coin pocket but continued to squeeze the pocket in order to identify what was in it despite knowing it did not contain a weapon. *Id.* at 246-47. The Washington

Supreme Court held the officer exceeded the permissible scope of a limited *Terry* frisk. *Id.* at 249. Because the officer immediately ascertained the object was not a weapon but continued to squeeze the contents, the search was unlawful and the contraband was suppressed. *Id.* at 254-55.

Garvin is controlling in this matter. *Garvin* requires this Court to conclude that Officer Goode's search of the coin pocket, and subsequent search of his main pants pocket, was unconstitutional. Here, the facts do not even rise to the level of "plain touch;" the officer's testimony shows that she did not even bother to feel the bulge in the pants, and there is no indication that she felt anything in the coin pocket whatsoever. Therefore, the court does not even have to get to the question if the officer immediately recognized she was feeling contraband or whether she continued his search after determining there was no weapon. See, *Garvin*, at 252 (citing *State v. Hudson*, 124 Wn.2d 107, 119, 874 P.2d 160 (1994) ("Without probable cause or an exception, any additional search after determining the suspect is unarmed is 'constitutionally invalid'") (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 379, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993)). Because the officer did not immediately recognize she was she was seeing contraband but continued her search without suspecting the object was a weapon, the search exceeded the permissible scope of a *Terry* frisk. *Garvin*, 166 Wn.2d at 252

d. Mr. Fisher did not receive the constitutionally guaranteed effective representation.

The record is sufficiently developed for this Court to review Mr. Fisher's claim that the search of his person which revealed heroin and cash was conducted without authority of law. The fact pattern is not particularly long or complicated; all of the facts pertaining to the seizure and to the subsequent search were presented during the trial. For the reasons stated above, Officer Goode's search of Mr. Fisher's pockets was unlawful and if defense counsel had brought a motion to suppress the heroin and cash, the trial court would have been required to grant it and the outcome of the proceedings would have been different.

The state and federal constitutions guarantee a defendant's reasonably effective representation by counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225 -226, 743 P.2d 816 (1987); U.S. Const. amend. 6; Const. art. 1, § 22. Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. *Thomas*, 109 Wn.2d at 225-226.

The first prong of the *Strickland* test requires "a showing that Counsel's

representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. *Strickland*, 466 U.S. at 689.

The second prong of *Strickland* requires the defendant to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine the confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Our Washington State Supreme Court has ruled that an appellant can obtain relief on appeal, where he failed to bring a motion to suppress in the proceedings below, when his counsel was ineffective in failing to bring a motion to suppress evidence and where there is a reasonable possibility that had counsel brought the motion, the outcome of the proceedings would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, counsel's failure to file a motion to suppress was unreasonable under the circumstances of this case, since there was no reason to believe such a motion would have been denied. As discussed above, suppression was required because no circumstances existed which would have justified the warrantless arrest and subsequent search. Counsel did not unsuccessfully seek suppression on other grounds, and then reasonably conclude further attempts would be similarly unsuccessful. Rather, no attempt was made at trial to suppress the evidence seized.

Moreover, the record clearly establishes that a motion to suppress was the only legitimate tactical choice. With the evidence suppressed, the state would have no evidence of possession, and the charges against Mr. Fisher would have been dismissed. The only alternative to suppression, and the course taken by counsel at trial, was to present Mr. Fisher's testimony that he did not know that he had drugs in his possession. RP at 178. This defense was wholly dependent upon his credibility. Mr. Fisher's rather unpromising defnse offered no explanation for how the heroin could have been put in his pocket; his defense consisted of merely stating that "I did not have any controlled substance to my knowledge." RP at 178.

Under these circumstances, a decision not to pursue suppression could not be considered a legitimate trial strategy. The record also establishes that

counsel's unprofessional error prejudiced the defense. The facts and circumstances of Mr. Fisher's search and subsequent arrest were fully developed at trial. The officer who contacted Mr. Fisher did not feel a weapon during her initial frisk, but nevertheless lifted his shirt. At that point the officer was conducting an illegal search, which was compounded when she further reached into the coin pocket. Mr. Fisher did not consent to the search, the evidence seized was not in plain view, and no exigent circumstances justified the warrantless search. Considering this evidence, the state could not carry its burden of overcoming the presumption that the warrantless search was unreasonable. See *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); *Hendrickson*, 129 Wn.2d at 71. Thus, there is no doubt that a motion to suppress the evidence seized would have been granted.

There is a reasonable probability that counsel's deficient performance prejudiced the outcome of the case. Mr. Fisher did not receive the constitutionally guaranteed effective assistance of counsel, and his conviction should be reversed. See *Thomas*, 109 Wn.2d at 226.

e. All of the evidence obtained from Mr. Fisher must be suppressed.

All evidence obtained, either directly or indirectly, as the result of an unlawful search or seizure must be suppressed. 371 U.S. 471, 484-85, 83 S.Ct.

407, 9 L.Ed 2d 441 (1963); *Ladson*, 138 Wn.2d at 359-60 (when a Terry stop is unlawful, a subsequent search and fruits of that search are inadmissible).

The extent to which evidence related to an illegal search or seizure may be suppressed depends on the extent to which evidence is derived from exploitation of the illegality. *Wong-Sun v. United States,* 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed 2d 441 (1963). If a defendant's custodial statements are obtained as a result of being in custody after an unlawful seizure and being confronted with evidence seized in an unlawful search pursuant to that seizure, the statements are inadmissible even if they are voluntary. *State v. Byers*, 88 Wn.2d 1, 10, 559 P.2d 1334 (1977), overruled on other grounds by *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984).

Here, all of the evidence seized from Mr. Fisher was obtained as a direct result of the unlawful search and seizure of him. The evidence seized from his pockets was obtained as a direct result of Officer Goode's unlawful unlawful search of the coin pocket after lifting his shirt. Mr. Fisher's arrest for possession of heroin was a nearly instantaneous, direct result of the evidence unlawfully seized from the coin pocket. The evidence was therefore obtained as a direct result of the unlawful search. Finally, Mr. Fisher stated to the officer that he forgot the heroin was in his pocket and that he had not used for two days. RP at 128. Therefore, the statement pertaining to the heroin is also fruit

of the poisonous tree. *Byer*s, 88 Wn.2d at 10. Because all of the evidence was "fruit of the poisonous tree" it must be suppressed. *Wong Sun*, 371 U.S. at 488.

E. CONCLUSION

Evidence seized pursuant to the unlawful search should have been suppressed. Trial counsel's failure to seek suppression constituted ineffective assistance of counsel and denied Mr. Fisher a fair trial. Because Mr. Fisher was unlawfully searched, all of the evidence obtained, including the heroin, money found in his pocket while being searched incident to arrest for possession of heroin, and statements made to the officer as a result of the search, should be suppressed.

DATED: September 23, 2016.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Dennis Fisher

CERTIFICATE OF SERVICE

The undersigned certifies that on September 23, 2016, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

Mr. Jesse Espinoza
Deputy Prosecuting Attorney
223 E 4th St Ste 11
Port Angeles, WA 98362-3000

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Dennis J.W. Fisher
154 Wood St.
Forks, WA 98331

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 23, 2016.

PETER B. TILLER

TILLER LAW OFFICE

September 23, 2016 - 4:47 PM

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